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BY FAX

August 8, 2002

The Honorable Karen Getman
Fair Political Practices Commission
428 J Street, Sixth Floor
Sacramento, CA 95814

Re: Proposed "Member Communication" Regulation 18531.7

Dear Chairman Getman:

I had hoped to attend your meeting tomorrow on behalf of the Los Angeles City Ethics Commission, but I will be unable to do so. In lieu of providing oral testimony tomorrow on proposed Regulation 18531.7, I respectfully request that you share these written comments with the other members of the Commission as you consider how that draft regulation should address several issues raised by Section 85312, relating to the "member communications" exemption of Prop. 34.

As your July staff memo indicates, the action you may take tomorrow to adopt language interpreting the 'member communications' exemption of Prop. 34 will embrace one of two approaches: narrow the scope of the exemptions created by the member communications provision; or broaden the scope of those exemptions by interpreting the provision to apply to an even wider range of persons and activities. As your staff memo also notes, "[w]hile the Commission has made several critical interpretations at the March [2002] meeting, which built on the foundation of determinations made in the prior year, the Commission asked staff to reexamine the draft regulation in light of lingering questions regarding the scope and implementation of the statute." How these questions are answered will have great consequence. In defining the scope of this provision, the FPPC's actions will either support curbs on the erosion of meaningful campaign finance reforms where they have been successfully implemented in the state, or they will simply create significant new loopholes that will undermine those successes.

As you know, the City of Los Angeles has the authority as a charter city to enact comprehensive campaign finance reforms that include a public matching funds program. It remains our position, which we believe is supported by Article XI, section 5 of the California Constitution and decisions of the California Supreme Court, that our program is not preempted by state law and that the City may enact elements of our program even if they appear to conflict with provisions of the Political Reform Act or the regulations of your Commission. Nevertheless, we believe that the latest staff draft of Regulation 18531.7 deserves comment because it could impact our program by resulting in confusion with regard to the issues this letter discusses. Our specific comments are outlined below.

- **Decision 3 – Sec. 18531.7 (a) - Should payments "*to*" a membership organization be treated as "payments" that are exempt under § 85312?**

Payments "to" an organization should not be so treated. The purpose for which this section was designed is to allow bona fide member organizations to communicate with its members on political matters. That purpose is sufficiently served by exempting the payments *made by* the organizations for communications to its members. More importantly, however, treating payments "to" organizations as exempt would allow persons to pass unlimited contributions through an organization in an attempt to influence voters, thus circumventing lawful contribution limits. Exempting payments "to" an organization for member communications simply creates an incentive for those who wish to use large or unlimited funds to influence a campaign to avoid complying with a jurisdiction's legitimate contribution limits. We would urge you to reject the bracketed language, ["or to"], in subsection (a), line 5.

- **Decision 2 – Sec. 18531.7(a)(3) - Should "member" be defined to include a person who simply makes a contribution to a political "committee?"**

It appears from the draft Regulation that the question of whether a political "committee" as defined in the Political Reform Act is not a decision that the Commission has been asked to consider at its meeting tomorrow. Assuming, therefore, that the Commission has previously adopted this approach in concept, it is our view that the term "member" should *not* include a person who simply makes a contribution to a "committee." Instead, "member" should be defined as originally intended by the voters, namely as persons who have a substantial relationship to an organization, such as someone who identifies as a member, pays membership dues and/or participates in the governance of the organization.

A more significant problem arises, however, due to the proposed treatment of a "committee" as a membership organization.

As drafted, it is not clear whether the proposed exclusion of a "candidate" from the definition of "organization" in Subsection (a)(1) at line14 also includes the candidate's *controlled committee*. The Los Angeles City campaign finance program, for example, provides public matching funds to a candidate and his or her committee if the candidate agrees to limit his or her campaign expenditures in the race. Expenditures covered by the limitation include those that a candidate incurs in communicating with voters for the purpose of influencing or attempting to influence the voters to support the election of that candidate. Defining "members" as contributors to a committee would allow a candidate who receives public matching funds in exchange for abiding by a spending limit to avoid having to comply with that spending limit because it would not count those communications expenditures as subject to the limit. Defining the term in this way, therefore, would undermine the heart of this successful approach to campaign finance reform. It this was not the staff's intention in crafting the draft Regulation, the matter can easily be clarified by simply having the Regulation say that.

- **Decision 4 – Sec. 18531.7 (e) - Should payments to an organization for member communications that are "behested" by a candidate be treated as "contributions" (and therefore be subject to limit) or *not* be counted as "contributions"?**

Draft Regulation 18531.7 (e) requires the Commission to determine whether, for purposes of Section 85312, a "behested" member communication to support or oppose a candidate or ballot measure should be counted as a "contribution." [1]

We would strongly urge the Commission to reject Options B and C,[2] and to adopt Option A to ensure that a behested payment is considered a contribution to the behesting candidate or committee. To do otherwise will promote the circumvention of lawful contribution limits by encouraging the use of large or unlimited contributions to finance member communications that are made precisely *under the control or at the direction of, in cooperation, consultation, coordination, or in concert with the candidate*. To increase the importance of such contributions to candidates is likely to only increase the potential for perceived or actual corruption, and therefore undermine legitimate contribution limits where they do exist.

We appreciate the opportunity to provide comment and we thank you for your consideration of the issues discussed in this letter.

Sincerely,

LeeAnn M. Pelham
Executive Director

[1] As you know, the PRA defines "made at the behest of" to mean made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Section 82015 provides that a payment "made at the behest" of a candidate is a contribution to the requesting candidate.

[2] We note that Option C would not treat a behested payment for a communication as a contribution if the "communication" (presumably its text) is created by the member organization. Who writes the text of a communication is simply not relevant to whether the payment should be treated as a contribution. Under the Act generally, a behested payment is treated as a contribution because it is made at the request of the candidate. There is no logical or policy reason to treat such payments differently in this context than it is treated in all other contexts.